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OVER FORTY YEARS IN THE ON-DECK CIRCLE: CONGRESS AND THE BASEBALL ANTITRUST EXEMPTION

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In the history of the legal regulation of professional teams sports, probably the widest known and least precisely understood is the trilogy of United States Supreme Court cases¹ establishing Major League Baseball's exemption from federal antitrust laws² and the actions of the United States Congress regarding the exemption. In the wake of the ouster of Fay Vincent as the Commissioner of Baseball³ and against

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1. *Federal Baseball v. National League*, 259 U.S. 200 (1922), *Toolson v. New York Yankees*, 346 U.S. 356 (1953), and *Flood v. Kuhn*, 407 U.S. 258 (1972).

2. The *Federal Baseball* case was brought under section 7 of the Sherman Antitrust Act, ch. 647, § 7, 26 Stat. 209, 210 (1890), and section 4 of the Clayton Act, ch. 323, § 4, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 15 (1988), alleging violations of sections 1 and 2 of the Sherman Act, ch. 647, §§ 1-2, 26 Stat. 210 (1890) (current version at 15 U.S.C. §§ 1-2 (1988)). *Toolson* involved alleged violations of sections 1 and 2 of the Sherman Act and section 4 of the Clayton Act. The *Flood* case initially involved five causes of action; the first four causes of action involved baseball's reserve system. The first cause of action involved sections 1 and 2 of the Sherman Act and section 4 of the Clayton Act. The second cause of action claimed violations of state antitrust laws and state civil rights statutes. The third cause of action involved alleged violations of state common law. The fourth cause of action asserted that the reserve system violated anti-peonage statutes, 42 U.S.C. § 1994 (1988) and 18 U.S.C. § 1581 (1988), the thirteenth amendment, U.S. CONST. amend. XIII, and the "freedom of labor" provisions of the Norris-LaGuardia Act, 29 U.S.C. §§ 102, 103 (1988). The fifth cause of action, not related to the reserve system, involved the ownership of the St. Louis Cardinals by the Anheuser-Busch, Inc. and the ownership of the New York Yankees by Columbia Broadcasting System. Summary judgment was granted to the Cardinals and Yankees on the fifth cause of action in *Flood v. Kuhn*, 312 F. Supp. 404 (S.D.N.Y. 1970). See, *Flood v. Kuhn*, 316 F. Supp. 271 (S.D.N.Y. 1970), *aff'd*, 443 F.2d 264 (2d Cir. 1971), *aff'd* 407 U.S. 258 (1972).

3. Fay Vincent, Baseball's eighth commissioner, resigned on September 7, 1992, after an 18-9-1 vote by Major League Baseball's 28 owners on September 3, 1992 calling for his resignation. Chicago White Sox chairman Jerry Reinsdorf, a key participant in the movement to force Vincent out of office, noted his desire for a new structure for baseball's commissioner: "He should be a CEO of the owners—not the players or the umpires of the fans. He would handle issues involving integrity or discipline. In issues involving business he would answer to the board of directors—the owners." Richard Demak, *Baseball Strikes Out: Commissioner Fay Vincent Resigns*, SPORTS ILLUSTRATED, Sept. 14, 1992, at 13. See also Hal Bodley, *The Last of His Kind: Restructure of Office Inevitable*, USA TODAY, Sept. 8, 1992; Jerome

the backdrop of another failed bid by St. Petersburg, Florida,⁴ to attract

Holtzman, *Baseball Revolt: Owners Call on Vincent to Quit*, CHI. TRIB., Sept. 4, 1992.

Representative Jack Brooks (D-TX), chairman of the Subcommittee on Economic and Commercial Law of the House Judiciary Committee, pointed to the ouster of Vincent as a crucial factor in convening subcommittee hearings on March 31, 1993, concerning baseball's antitrust exemption:

We were drawn to this point by the failure of the owners to respect the independence of their chosen commissioner who was charged with making decisions in the best interest of the game, but who was then forced to pay the ultimate price for keeping to that standard.

Hearings on Baseball's Antitrust Exemption before the Subcommittee on Economic and Commercial Law of the House Committee on the Judiciary, 103d Cong., 1st Sess. 2 (1993) [hereinafter 1993 Hearings] (statement of Rep. Brooks).

Senator Howard Metzenbaum, D-OH, sponsor of the "Professional Baseball Antitrust Reform Act of 1993," S. 500, 103d Cong., 1st Sess. (1993) reacted strongly to Baseball's inability to name a new commissioner in January 1994. In an article in *Baseball America*, Metzenbaum argued

During their quarterly meetings in January, the barons of baseball proved once again that they can't be trusted to act in the best interests of the game or its fans. Despite assurances to Congress that a new commissioner would be named by the first of the year, major league owners refused to appoint anyone to the post. By thumbing their collective noses at Congress and the fans, the owners have undercut any possible claim to the extraordinary privilege that they alone enjoy: blanket immunity from our nation's fair competition antitrust laws.

After attacking the owners for initiating fundamental changes in the commissioner's position including responsibility as chief labor negotiator for ownership, Metzenbaum assailed ownership's reliance on the antitrust exemption for restricting the number of televised regular season and playoff games, the artificial scarcity of franchises, and for exacting tax subsidies and concessions from cities with major league franchises. The senator concluded by stating "Baseball must be made subject to the pro-competitive and pro-consumer test of our antitrust laws. As we saw clearly this January, the sport and its fans will suffer until we impose real accountability on the owners. The game is our national pastime, and the time has come to take it back." Howard Metzenbaum, *Perspective*, BASEBALL AM., Feb. 21-Mar. 6, 1994, at 8.

4. Ownership groups hoping to attract either an existing team to St. Petersburg, Florida, or to receive an expansion franchise have been rebuffed on numerous occasions by Major League Baseball. The most recent involved the failed attempt to purchase the San Francisco Giants and move the team to St. Petersburg. On August 7, 1992, Giants owner Bob Lurie announced he had reached an agreement with a Tampa, Florida, group to sell the team for \$113 million. The group stated that the team would play its home games in the Suncoast Dome in St. Petersburg. Lurie's decision came just two months after the citizens of San Jose, California, defeated a referendum to fund the construction of a new stadium for the Giants in the Bay area. The vote was the fourth negative decision by Bay area voters concerning a proposal to finance a new stadium. William Carlsen & Marc Sandalow, *Giants OK Deal to Leave; League to Vote on Sale to Florida Group; Team Could Move After the Season*, S.F. CHRON., Aug. 8, 1992, at A1.

During August 1992, George Shinn, owner of the National Basketball Association's Charlotte Hornets, joined with a local San Francisco investment group to present a bid for the Giants. Shinn's plan of reducing the Giants payroll prompted the local ownership group to convince Peter Magowan to replace Shinn as the head of the group. William Carlsen, *How Giants Were Saved; Charlotte Businessman George Shinn Kept Locals From Giving Up*, S.F. CHRON., Nov. 12, 1992, at A1. This restructured group presented National League President Bill White with a \$95 million offer on October 12. *Id.* Sixteen days later the group raised their bid to \$100 million. On November 10, the National League owners, by a secret vote of nine to four, rejected the Tampa offer. Marc Sandalow & April Lynch, *Giants to Stay; League*

a franchise, the 103d Congress is again considering legislation⁵ to alter the long-standing status of baseball under the antitrust laws.

This article will explore the creation of the exemption and prior legislative activities surrounding baseball's unusual position in American antitrust law. The current legislation before Congress will be analyzed together with testimony and commentary on these legislative initiatives. The conclusion will present an argument for legislation drafted to resolve specific antitrust problems rather than the passage of sweeping legislation to remove completely the antitrust exemption.

THE BIRTH OF THE EXEMPTION

The early history of professional baseball⁶ was replete with franchise instability, harsh labor conditions for players, and the birth and death of numerous leagues. In 1903 baseball established a measure

Turns Down Tampa Bay; Lurie Considering Local Offer; 9-to-4 Vote Against Moving Team, S.F. CHRON., Nov. 11, 1992, at A1.

Three suits were filed in San Francisco Superior Court. First, the city of San Francisco sued the Giants, Lurie, and the Tampa group for violating the lease for Candlestick Park. The Tampa group filed a counter-claim based on the city and local investors interference with Lurie's contract to sell to them the Giants. Second, a local neighborhood coalition filed to invalidate San Francisco's agreement to indemnify the local investors. Third, local investors requested a declaratory judgment that they had not interfered with the contract of sale to the Tampa group. Reynolds Holding, *S.F. Investors Face New Suit By Tampa Bay; Complaints Now Total 7 in Flood of Legal Action*, S.F. CHRON., Nov. 14, 1992, at A1.

The local investment group also sought a declaratory judgment in the United States District Court for the Northern District of California claiming that they had not interfered with the Tampa transaction nor had they violated antitrust law by bidding for the Giants. *Id.*

Two suits were filed in Pinellas County Circuit Court in St. Petersburg. First, the Tampa investment group requested an order allowing them to sue Major League Baseball despite a signed covenant not to sue. The Tampa group alleged that the agreement was based upon fraud by Bud Selig, Bill White, and the National League owners. Second, the Tampa group also filed suit against the city of San Francisco, the San Francisco investment group, George Shinn, and San Francisco Mayor Frank Jordan for alleged interference with the contract to sell the Giants. *Id.*

Vincent Piazza and Vincent Tirendi, two members of the Tampa investment group sued Major League Baseball alleging violations of federal constitutional and antitrust law and certain state laws. Reynolds Holding, *Lurie Sued by S.F. Over Giants' Lease; City Wants Him and the Florida Contingent to Pay Costs of Fight to Keep the Team*, S.F. CHRON., Nov. 17, 1992, at A17. For a complete discussion, see *infra* text accompanying notes 176-200.

Senator Bob Graham (D-FL), a cosponsor of Senator Metzenbaum's "Professional Baseball Antitrust Reform Act of 1993," noted in his March 1993 remarks before the Subcommittee on Economic and Commercial Law of the House Committee on the Judiciary his displeasure with Major League Baseball over the treatment of the Tampa Bay area. 1993 Hearings, *supra* note 3 at 6-11.

5. H.R. 108, H.R. 1549, S. 500, 103d Cong., 1st Sess. (1993).

6. See CHARLES ALEXANDER, *OUR GAME: AN AMERICAN BASEBALL HISTORY* (1991); HAROLD SEYMOUR, *BASEBALL: THE EARLY YEARS* (1960); DAVID Q. VOIGHT, *AMERICAN BASEBALL* (1970-1983).

of stability with the acceptance by the National League of the American League as an equal partner at the pinnacle of Organized Baseball's major and minor league structure.⁷ The growing pains of the Nineteenth Century were replaced by a new level of maturity as baseball assumed its place as the "National Pastime." Against this backdrop of the emergence of baseball as an American national sporting phenomenon was the convergence of United States antitrust laws with the organizational structure of professional baseball to produce the legal framework which has remained baseball's hallmark and distinguishing legal feature.

The creation of baseball's antitrust exemption began with the demise of the upstart Federal League in 1915.⁸ In March 1913, the Federal League was created with franchises in Baltimore, Brooklyn, Buffalo, Chicago, Indianapolis, Kansas City, Pittsburgh, and St. Louis. The Federal League promoted more harmonious relations with players by using option clauses coupled with salary increases and the possibility of free agency instead of the stricter reserve clauses used by the recognized major leagues.⁹ When the American and National Leagues refused to recognize the Federal League and allow it to participate as a member of the National Agreement¹⁰ prior to the 1914 season, the Federal League escalated its efforts to become a third major league. The Federal League aggressively sought to sign American and National League players and minor league players with reserve clauses.¹¹ The Federal League owners also embarked on a major building program by constructing new stadiums between 1913 and 1914.

After two court skirmishes¹² concerning the signing of players from National and American League teams, the Federal League filed an

7. ALEXANDER, *supra* note 6, at 82-83; SEYMOUR, *Early Years*, *supra* note 6, at 307-324.

8. For a discussion of the history of the Federal League, see Gary Hailey, *Anatomy of a Murder: The Federal League and the Courts*, NAT'L PASTIME, Spring 1985 at 62; LEE LOWENFISH, *THE IMPERFECT DIAMOND: A HISTORY OF BASEBALL'S LABOR WARS* 85-100 (Revised edition 1991); LIONEL SOBEL, *PROFESSIONAL SPORTS & THE LAW* 1-7 (1977); HAROLD SEYMOUR, *BASEBALL: THE GOLDEN AGE* 196-213 (1971).

9. LOWENFISH, *supra* note 8, at 86; SEYMOUR, *THE GOLDEN AGE*, *supra* note 8, at 201.

10. The National Agreement was an outgrowth of the January 1903 Peace Agreement reached between the National and American Leagues and the National Association of Professional Minor Leagues. The Agreement established a National Commission consisting of the presidents of each league and a third member, Cincinnati Reds President August Herrmann. The major features of the National Agreement was the enforcement of reserve clauses amongst all members and the use of blacklisting against any party who failed to observe the reserve clause of respective members. See LOWENFISH, *supra* note 8, at 70.

11. Sobel, *supra* note 8 at 2. ORGANIZED BASEBALL: REPORT OF THE SUBCOMMITTEE ON THE STUDY OF MONOPOLY POWER OF THE COMMITTEE ON THE JUDICIARY, H.R. REP. NO. 2002, 82d Cong., 2d Sess. 50-57 (1952) [hereinafter 1952 ORGANIZED BASEBALL REPORT].

12. American League Baseball Club of Chicago v. Chase, 86 Misc. 441, 149 N.Y.S. 6 (Sup. Ct. 1914), *Weeghman v. Killifer*, 214 F. 168 (W.D. Mich.), *aff'd*, 215 F. 289 (6th Cir. 1914).

antitrust action in Chicago on January 5, 1915. The case was assigned to Judge Kenesaw Mountain Landis, noted for his "trustbusting" decision against the Standard Oil Company. The Federal League's claim was that the National Agreement's reserve and blacklisting system constituted an unreasonable and illegal restraint of trade. Although the trial was completed by late January,¹³ Landis considered the evidence for the entire 1915 season without rendering a ruling. Unable to last competitively any longer, Federal League President James Gilmore and Newark owner Harry Sinclair¹⁴ struck a deal with Organized Baseball on December 13, 1915.

The tentative peace agreement allowed each of the Federal League owners to sell their players' contracts to the highest bidder after declaring that all blacklisted players from the Federal League would be declared eligible to play. The National League owners purchased the Brooklyn Federals' stadium for \$400,000. American League owners had to pay one-half of that settlement. Chicago Federals owner Charles E. Weeghman was allowed to purchase the Chicago Cubs and the National League contributed \$50,000 of the purchase price. The Pittsburgh Federals were purchased by the National League owners for \$50,000. Buffalo and Kansas City had already dropped out of the league for financial reasons before the end of the season. Phil Ball, the owner of the St. Louis Federals team received the American League franchise in St. Louis. Only the Baltimore franchise and its president Carroll W. Rasin were left out of the agreement.¹⁵

Baltimore filed suit in federal district court in Washington, D.C. in 1917. The trial did not begin until March 1919. The Baltimore team won a jury verdict assessing damages of \$80,000.¹⁶ After trebling that award and adding \$24,000 in attorneys' fees, the final award was \$254,000.¹⁷ On appeal, lawyers for Organized Baseball contended that their sport was neither "trade or commerce among the several States"¹⁸ and, therefore, the Sherman Act was inapplicable. The appellate court agreed and reversed the district court decision.¹⁹

13. Lowenfish, *supra* note 8 at 90.

14. Harry Sinclair had moved the Indianapolis franchise to Newark prior to the 1915 season. Sinclair gained notoriety as a principal in the Teapot Dome Scandal. See Hailey, *supra* note 8 at 68.

15. *Id.*

16. *Federal Baseball v. National League*, 259 U.S. 200, 208 (1922).

17. Hailey, *supra* note 8 at 71; 1952 ORGANIZED BASEBALL, *supra* note 11 at 57.

18. Sherman Act, ch. 647, § 1, 26 Stat. 209 (1890) (current version at 15 U.S.C. § 1 (1988)).

19. *National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore*, 269 F. 681 (D.C. Cir. 1921).

Justice Oliver Wendell Holmes rendered the Supreme Court's unanimous decision on May 29, 1922. Holmes reasoned that

[t]he business is giving exhibitions of base ball, which are purely state affairs. . . . That to which it is incident, the exhibition, although made for money would not be called trade or commerce in the commonly accepted use of those words. As it is put by the defendants, personal effort, not related to production, is not the subject of commerce.²⁰

As a reward for his support of Organized Baseball and in the wake of the 1919 Black Sox Scandal,²¹ Judge Landis was named the first Commissioner of Baseball on November 12, 1920. Landis established himself as a strong-willed leader with his handling of the eight White Sox players implicated in throwing the 1919 World Series. He ruled Organized Baseball for the next quarter century of relative labor peace until his death in November 1944.

DANNY GARDELLA AND THE ENTRY OF CONGRESS

During World War II, many of major league baseball's stars and supporting cast were called away to participate in the war effort opening roster spots for aging players as well as many mired in the minor leagues. The end of the war would prompt a return of numerous former major league players, and a number of players would be forced out of their wartime occupation.²² One player effected by the war's end was Danny Gardella. Gardella, a minor league player from 1939 through 1941, was talked out of his job in a New York shipyard to play outfield for the New York Giants in 1944 and 1945. Gardella reported for spring training in 1946 unsigned and knowing his chances of the making the Gians were slim.

Well aware of the abundance of talent and wanting to elevate his league to a new level, Don Jorge Pasquel, president of the Mexican League, together with his brother, Bernardo Pasquel, League vice president, had begun a full-scale effort to attract major league stars to Mexico.²³ He succeeded in signing eighteen major league players to

20. 259 U.S. at 208-209.

21. For a discussion of the 1919 World Series and its legacy, see ELIOT ASINOF, *EIGHT MEN OUT: THE BLACK SOX AND THE 1919 WORLD SERIES* (1963); DONALD GROPMAN, *SAY IT AIN'T SO, JOE! THE STORY OF SHOELESS JOE JACKSON* (1979); HARVEY FROMMER, *SHOELESS JOE AND RAGTIME BASEBALL* (1992).

22. Lowenfish, *supra* note 8 at 125.

23. SOBEL, *supra* note 8, at 8.

contracts including Gardella. All eighteen players were suspended for five years by Commissioner Happy Chandler for their transgressions. Gardella filed suit in the Southern District of New York requesting treble damages under sections 1, 2 and 3 of the Sherman Act²⁴ and sections two and three of the Clayton Act.²⁵ Judge Henry W. Goddard dismissed the suit finding that *Federal Baseball*²⁶ was controlling.²⁷ On February 9, 1949, a three judge panel of the Second Circuit Court of Appeals, in separate opinions, reversed Goddard's decision.²⁸ Judge Jerome N. Frank, relying on subsequent Supreme Court decisions which "completely destroyed the vitality"²⁹ of *Federal Baseball* and "left that case but an impotent zombi [sic],"³⁰ joined with Judge Learned Hand in remanding the case for trial.

Congressman A. S. "Syd" Herlong, a former minor league player and executive, and Wilbur Mills responded to the Second Circuit decision by introducing a bill in April 1949 to grant baseball an antitrust exemption and to legalize the reserve clause.³¹ Gardella, together with two other players³² who had left major league clubs to play in Mexico, proceeded to request injunctive relief from the Southern District of New York in order to return to their profession. Ruling that a preliminary injunction would have granted the players complete relief without a trial, the Southern District denied their requests and the Second Circuit upheld the decision.³³

Commissioner Chandler moved in June to preempt future court action by granting amnesty to all blacklisted players.³⁴ However, Gardella had already headed to Canada to play in a league which Organized Baseball had not blacklisted. One month prior to the commencement of the trial, Gardella settled his suit with Commissioner Chandler delaying judicial consideration of the reserve clause.³⁵

24. Sherman Act, ch. 647, §§ 1-3, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-3 (1988)).

25. Clayton Act, ch. 323, §§ 3-4, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. §§ 14-15 (1988)).

26. 259 U.S. 200 (1922).

27. *Gardella v. Chandler*, 79 F. Supp. 260 (S.D.N.Y. 1948).

28. *Gardella v. Chandler*, 172 F.2d 402 (2d Cir. 1949). For a discussion of the *Gardella* case see Samuel R. Pierce, Jr., *Organized Professional Team Sports and the Antitrust Laws*, 43 CORNELL L.Q. 566, 569-573 (1958).

29. 172 F.2d at 408.

30. *Id.* at 408-409.

31. LOWENFISH, *supra* note 8, at 164.

32. Max Lanier and Fred Martin.

33. *Gardella v. Chandler*, 1949 CCH Trade Cases ¶ 62,412 (S.D.N.Y. 1949), *aff'd*, 174 F.2d 919 (2d Cir. 1949), *Martin v. Chandler*, 149 CCH Trade Cases ¶ 62,397 (S.D.N.Y.), *aff'd*, 174 F.2d 917 (2d Cir. 1949).

34. SOBEL, *supra* note 8, at 18; LOWENFISH, *supra* note 8, at 165-166.

35. SOBEL, *supra* note 8, at 19; LOWENFISH, *supra* note 8, at 167.

Feeling that Judge Frank's position in the *Gardella* case had supplanted the *Federal Baseball* position and pressured by the filing of eight lawsuits against Organized Baseball, three bills were introduced in 1951 in the House of Representatives³⁶ and one in the Senate³⁷ that would have granted all professional sports leagues an exemption from antitrust laws.³⁸ Lengthy hearings were held by Congressman Emanuel Celler's Subcommittee on the Study of Monopoly Power.³⁹ The subcommittee ultimately voted to recommend that the bills not be passed because they felt that a complete exemption from the antitrust laws was not warranted.⁴⁰ The subcommittee, noting changes both in Supreme Court interpretations of commerce clause and the growth of the minor league farm system and radio and television coverage of baseball, stated that "it may be seriously doubted whether baseball should now be regarded as exempt from the antitrust laws."⁴¹ Determining that some form of a reserve clause was essential for the operation of professional baseball,⁴² the subcommittee argued that legislation would be premature prior to judicial determination of whether or not the reserve rules were legal under a rule of reason analysis.⁴³

THE SUPREME COURT REAFFIRMS *FEDERAL BASEBALL* IN *TOOLSON V. NEW YORK YANKEES*

Although assuring the Congressional subcommittee that the reserve system would be tested under the rule of reason, lawyers for Organized Baseball were arguing in federal courts that the *Federal Baseball* decision was correct and baseball was still beyond the reach of antitrust law. Their position was reaffirmed by the Supreme Court in *Toolson*

36. H.R. 4229, H.R. 4230, H.R. 4231, 82d Cong., 1st Sess. (1951).

37. S. 1526, 82d Cong., 1st Sess. (1951).

38. The three House bills, H.R. 4229, H.R. 4230, and H.R. 4231, provided that the Sherman Act, the Clayton Act, the Federal Trade Commission Act, and the Robinson-Patman Act "shall not apply to organized professional sports enterprises or to acts in the conduct of such enterprises." The only difference in S. 1526 was the lack of mention of the Robinson-Patman Act. *Id.* For a brief discussion of the legislation see Pierce, *supra* note 24 at 573.

39. *Hearings before the Subcommittee on the Study of Monopoly Power of the Committee on the Judiciary*, 82d Cong., 1st Sess. (1951) [hereinafter *1951 Hearings*]. See LOWENFISH, *supra* note 8, at 171-181.

40. *1952 Organized Baseball Report*, *supra* note 11, at 230.

41. *Id.* at 135.

42. *Id.* at 229.

43. *Id.* at 231-232. See also LOWENFISH, *supra* note 8, at 180-181.

v. *New York Yankees*,⁴⁴ a decision combining three lower court decisions.⁴⁵

George Toolson had brought an action against the New York Yankees for treble damages under sections one and two of the Sherman Act⁴⁶ and section four of the Clayton Act.⁴⁷ Toolson was under contract with the Newark International Baseball Club, a farm team for the New York Yankees, when his contract was assigned to Binghamton. Toolson refused to report and was, therefore, placed on the "ineligible list" of the Binghamton team. This effectively blacklisted Toolson from playing with any other baseball team.

The United States District Court for the Southern District of California held for the Yankees citing *Federal Baseball*⁴⁸ as controlling. Judge Harrison listed numerous citations to *Federal Baseball* and noted that only *Gardella*⁴⁹ had challenged its validity. The judge concluded that he was bound by *Federal Baseball* and could not disregard it. He noted the ongoing Congressional hearings and that Congress had the power to determine the issue before him. He dismissed the case for lack of subject matter jurisdiction. The United States Court of Appeals for the Ninth Circuit affirmed the district court in a per curiam opinion.⁵⁰

On November 9, 1953, the Supreme Court issued a terse one paragraph majority per curiam opinion, finding that

Congress has had the ruling (*Federal Baseball*) under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect. The business has been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be legislation. Without re-examination of the underlying issues, the judgments below are affirmed on the authority of *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs* . . . so far as that decision determines that Congress

44. 346 U.S. 356 (1953).

45. *Toolson v. New York Yankees*, 101 F. Supp. 93 (S.D. Cal. 1951), *aff'd*, 200 F.2d 198 (9th Cir. 1952); *Kowalski v. Chandler*, 202 F.2d 413 (6th Cir. 1953); *Corbett v. Chandler*, 202 F.2d 428 (6th Cir. 1953).

46. Sherman Act, ch. 647, §§ 1-2, 26 Stat. 210 (1890) (current version at 15 U.S.C. §§ 1-2 (1988)).

47. Clayton Act, ch. 323, § 4, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 15 (1988)).

48. 259 U.S. 200 (1922).

49. 172 F.2d 402 (2d Cir. 1949).

50. 200 F.2d 198 (9th Cir. 1952).

had no intention of including the business of baseball within the scope of the Federal antitrust laws.⁵¹

Justice Burton issued a strongly worded dissent which Justice Reed joined. Burton argued that

Whatever may have been the situation when the *Federal Baseball* case . . . was decided in 1922, I am not able to join today's decision which, in effect, announces that organized baseball, in 1953, still is not engaged in interstate trade or commerce.⁵²

Burton quoted the 1952 Judiciary Subcommittee report⁵³ to support his argument that baseball was interstate in nature before attacking the basic premise of the majority opinion.

In the *Federal Baseball Club* case the Court did not state that even if the activities of organized baseball amounted to interstate trade or commerce those activities were exempt from the Sherman Act. The court acted on its determination that the activities before it did not amount to interstate commerce.⁵⁴

Turning the Congressional issue around, Burton stated

Congress, however, has enacted no express exemption of organized baseball from the Sherman Act, and no court has demonstrated the existence of an implied exemption from that Act of any sport that is so highly organized as to amount to an interstate monopoly or which restrains interstate trade or commerce. In the absence of such an exemption, the present popularity of organized baseball increases, rather than diminishes, the importance of its compliance with standards of reasonableness comparable with those now required by law of interstate trade or commerce. It is interstate trade or commerce and, as such, it is subject to the Sherman Act until exempted.⁵⁵

Professor Lionel Sobel adroitly noted in *Professional Sports and the Law*,⁵⁶ that the *Toolson* decision can be assailed on four grounds. First, Congressional legislation was not, as the court implied, targeted

51. 346 U.S. at 356-7.

52. 346 U.S. at 357.

53. *Id.* at 358. See 1952 ORGANIZED BASEBALL REPORT, *supra* note 11.

54. 346 U.S. at 358.

55. *Id.* at 364-365.

56. SOBEL, *supra* note 8.

at overturning *Federal Baseball*.⁵⁷ Instead, the legislation "would have reactivated the exemption Congress believed no longer existed."⁵⁸ Second, Sobel attacked the court's determination that Congress did not intend to include baseball within the antitrust proscription. Instead, the Court had found that baseball was not interstate commerce as understood in 1922. Third, Sobel noted that the Court ignored its own subsequent decisions as noted by Judge Frank in his *Gardella* opinion.⁵⁹ Fourth, because no trial was held there was no showing that Organized Baseball had relied upon its exemption. "Moreover, all of the actions which gave rise to the lawsuits decided by the Court in *Toolson* were taken after the decision of the Court of Appeals in *Gardella v. Chandler*. Even if Organized Baseball had in fact relied upon its exemption prior to *Gardella*, reliance thereafter hardly would have been justified."⁶⁰ An additional point not added by Sobel was the Court's insistence that Congressional action would have a prospective effect. Also, the Court felt that a decision to overrule prior case law would apply the Sherman and Clayton acts retrospectively. This concern over the possibility of extensive litigation over previous activities of Major League Baseball foreshadowed more extensive discussion of this issue in *Flood v. Kuhn*.⁶¹

In response to the *Toolson* decision, the Senate held hearings in March, April, and May 1954 on Senate Joint Resolution 133.⁶² The resolution, proposed by Senator Edwin C. Johnson of Colorado, originally proposed to remove the antitrust exemption from any baseball team owned by a brewer. In particular, the legislation targeted the acquisition of the St. Louis Cardinals by August A. Busch, Jr., President of the Anheuser Busch, Inc. Johnson was concerned that lower court opinions dealing with boxing and legitimate theatre were threatening the viability of the *Toolson* decision. Assistant Attorney General Stanley W. Barnes testified against the measure in March 1954 because it targeted only teams owned by breweries rather than all baseball teams, and created difficulties with enforcement.⁶³ The

57. *Id.* at 28.

58. *Id.*

59. *Id.* at 29. Sobel points to Frank's numerous citations listed in footnotes 7a, b, & c of his opinion in *Gardella*, 172 F.2d at 412. Of particular importance is the Supreme Court's decision in *United States v. Southeastern Underwriters Assn.*, 322 U.S. 533 (1944) which overruled *Hooper v. California*, 155 U.S. 648 (1895). *Hooper* was one of the few cases cited in *Federal Baseball*, 259 U.S. at 209.

60. *Id.* at 29.

61. 407 U.S. 258, 283 (1972).

62. *Hearings on S.J. Res. 133 Subjecting Professional Baseball Clubs to Antitrust Laws before the Committee on the Judiciary*, 83d Cong., 2d Sess. (1954).

63. *Id.* at 4-5.

resolution was amended prior to the May hearings in order to include any team owned by any corporation subject to the antitrust laws⁶⁴ Senator Johnson's amendments were targeted at the position taken by the Antitrust Division of the Department of Justice that the *Toolson* decision needed to be reversed in order to protect the broad application of antitrust laws to other industries.⁶⁵ Ultimately, the Senate took no action on the proposal.

Soon after rendering the *Toolson* decision, the Supreme Court further confused the jurisprudence in this area by determining in subsequent decisions concerning legitimate theatre,⁶⁶ boxing,⁶⁷ and football⁶⁸ that *Federal Baseball* did not extend federal antitrust immunity to these industries.

RADOVICH V. NATIONAL FOOTBALL LEAGUE

Of particular importance was the Supreme Court's decision in *Radovich v. National Football League*.⁶⁹ Radovich played for the Detroit Lions in the National Football League in 1945. Prior to the beginning of the 1946 season, Radovich requested a trade to the Los Angeles Rams in order to be near his father who was ill. After the Lions refused Radovich's request, he signed with the Los Angeles Dons of the All-America Conference. He played with the Dons for two seasons. In 1948, Radovich was offered a player-coach position with the San Francisco Clippers of the Pacific Coast League. However, the Clippers were informed by the National Football League that it would be severely penalized for employing Radovich who had been blacklisted for jumping to the rival league. The Ninth Circuit Court of Appeals⁷⁰ held that under the *Federal Baseball* and *Toolson* decisions, football was exempt from antitrust scrutiny.

The United States Supreme Court reversed the Ninth Circuit fashioning a narrow use of stare decisis in determining that *Federal Baseball* and *Toolson* applied only to professional baseball. Squarely placing the issue before Congress, the Court declared that:

64. *Id.* at 67-68.

65. *Id.* at 69.

66. *United States v. Shubert*, 348 U.S. 22 (1956).

67. *United States v. International Boxing Club*, 348 U.S. 236 (1955).

68. *Radovich v. National Football League*, 358 U.S. 445 (1957). For contemporary discussions of *Radovich*, see Maxwell Keith, *Developments in the Application of Antitrust Laws to Professional Team Sports*, 10 HASTINGS L.J. 119 (1958); Recent Development, Professional Football Held Within Purview of Sherman Act, 57 COLUM. L. REV. 725 (1957), Robert C. Webb, Note, 36 N.C. L. REV. 315 (1958).

69. *Id.*

70. 231 F.2d 620 (9th Cir. 1956).

Congressional processes are more accommodative, affording the whole industry hearings and an opportunity to assist in the formulation of new legislation. The resulting product is therefore more likely to protect the industry and the public alike. The whole scope of congressional action would be known long in advance and effective dates for the legislation could be set in the future without the injustices of retroactively and surprise which might follow court action.⁷¹

In June 1957, the House Antitrust Committee held fifteen days of hearings⁷² on seven different bills.⁷³ H.R. 5383 created a complete exemption from antitrust laws for all professional team sports. H.R. 5307 and H.R. 5319 required that professional baseball would join all other team sports within the purview of antitrust scrutiny. The other four bills established an exemption for certain league practices within the context of antitrust coverage for all team sports. H.R. 6876 and H.R. 6877 exempted playing rules, league organization, territorial allocations, and player employment matters. The two bills, however, did provide players with the right to unionize for the purpose of collective bargaining. H.R. 8023 also allowed an exemption for a modified reserve clause if the clause did not exceed five years in duration and the compensation to the player was increased by fifteen percent in each of the last two years of the contract. H.R. 8124, provided the same exemptions as H.R. 6876 and H.R. 6877, while also providing antitrust protection for the league's player selection drafts.

The impact of radio and television rights, particularly with respect to the minor leagues, was a point of emphasis of Commissioner Ford Frick and George Trautman, President of the National Association.⁷⁴ Broadcasts of major league games into minor league markets had reduced interest in attendance and broadcasting of minor league games. The Department of Justice, moreover, threatened antitrust action against Major League Baseball if it attempted to restrict broadcasts into minor league territories.⁷⁵ Despite the significant attention created by the numerous legislative initiatives, the lengthy hearings, and the impact of the *Radovich* decision, the first session of the 85th Congress, did not report any legislation out of committee.

71. 352 U.S. at 452.

72. *Hearings on H.R. 5307, Antitrust Subcommittee of the House Committee on the Judiciary*, 85th Congress, 1st Sess. (1957) [hereinafter *1957 Hearings*].

73. H.R. 5307, H.R. 5319, H.R. 5383, H.R. 6876, H.R. 6877. H.R. 8023, and H.R. 8124, 85th Cong., 1st Sess. (1957).

74. *1957 Hearings*, *supra* note 72, at 101-103 and 190-191.

75. *Id.* at 102.

More hearings followed in 1958 after Emanuel Celler introduced a bill⁷⁶ to place all professional sports under antitrust laws with the express exemption of activities which were "reasonably necessary" to the "(1) equalization of competitive playing strengths; (2) the right to operate within specific geographic areas; and (3) the preservation of public confidence in the honesty of sports contests."⁷⁷ The House Judiciary Committee favorably reported the legislation out of Committee urging the full House to pass it.⁷⁸ The Committee noted that the legislation was targeted towards removing the per se implications and allowing a rule of reason analysis.⁷⁹ When the bill reached the House floor, however, it was amended⁸⁰ to omit the "reasonably necessary" language in order to exempt the player draft, the reserve clause, and exclusive territorial allocation. H.R. 10378 was passed with the amendment.⁸¹ The bill was sent to the Senate, and, although twelve days of hearings were conducted by the Senate Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary,⁸² no action was taken by the Subcommittee.

Samuel R. Pierce, Jr., writing for the *Cornell Law Quarterly* in 1958, pushed Congress to enact legislation because "the judiciary, through its unfamiliarity in this field and by indiscriminately applying conventional per se concepts, may completely destroy the foundations upon which these sports are built."⁸³ Pierce argued that complete immunity from antitrust scrutiny "would be absolutely unjustified,"⁸⁴ allowing leagues to avoid antitrust liability for any type of business activity including restraints on broadcasting rights. However, Pierce argued that allowing complete coverage by antitrust laws would also be unwarranted. Pierce felt that such action would prompt substantial and costly litigation in an area of unsettled law. The resulting "economic instability" would create "an attendant detrimental effect upon athletic competition, players, sports fans, and the communities in which clubs operate."⁸⁵ Pierce also rejected suggestions for a governmental agency to regulate team sports.⁸⁶ Pierce proposed the

76. H.R. 10378, 85th Cong., 2d Sess. (1958).

77. *Id.* For a criticism of the "lack of definiteness" in the "reasonably necessary" language, see Pierce, *supra* note 28 at 579 and 610-611.

78. H. Rep. 1720, 85th Cong., 2d Sess. (1958).

79. *Id.* at 7.

80. 104 CONG. REC. 12,098 (1958).

81. *Id.* at 12,105.

82. *Hearings on H.R. 10378 and S. 4070 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 85th Cong., 2d Sess. (1958).

83. Pierce, *supra* note 28 at 606.

84. *Id.* at 607.

85. *Id.* at 608.

86. *Id.* at 609.

grant of a partial exemption to team sports. Believing that the reserve system was necessary, Pierce argued that a team should be allowed to use the reserve clause to protect their interest in a player as long as he stayed within the league; however, use of the reserve system to prevent a player from moving to another league would be prohibited. In exchange for Congressional approval of the reserve system, salary arbitration was offered to offset management power in salary negotiations. Although arguing that labor unionization in sports had been "nothing but failure,"⁸⁷ Pierce would have predicated any exemption for the reserve clause on allowing the use of collective bargaining. The draft and geographical territorial allocations would also have been provided with an exemption. In the area of broadcast rights, Pierce promoted blackouts within a team's home territory, but he would not have allowed any restrictions upon radio broadcasting. The author would not have provided an exemption to protect the farm system. Pierce also argued that the proposed legislation should not have retroactive effect.⁸⁸

The 86th Congress considered bills introduced by Senators Hennings, Dirksen and Keating⁸⁹ and Estes Kefauver.⁹⁰ The Hennings-Dirksen-Keating initiatives was comparable to that considered by the 85th Congress. Keating noted that "[o]ne of the problems of these sports given special treatment in the bill is the regulation of the telecasting of major league games into minor league areas. No one who considers the plight of the minor leagues under the present broadcasting policy of the majors would disagree with the necessity for such provisions."⁹¹ Kefauver's bill exempted practices designed to equalize team playing strengths, exclusive territorial assignments, actions to preserve honesty, and the regulation of radio and television broadcasting of sports contests.

Hearings were conducted on both legislative initiatives.⁹² After the hearings, Kefauver introduced another bill which was reported favorably by the Antitrust Subcommittee in the fall of 1959. A third initiative from Kefauver⁹³ distinguished between the activities of

87. *Id.* at 613.

88. *Id.* at 614.

89. S. 616, 86th Cong., 1st Sess. (1959). For a discussion of the legislation see Kenneth B. Keating, *The Antitrust Threat to Professional Team Sports*, 1959 ANTITRUST LAW SYMPOSIUM at 23.

90. S. 886, 86th Cong., 1st Sess. (1959).

91. Keating, *supra* note 89 at 25.

92. *Hearings on S. 616 and S. 886 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 86th Cong., 1st Sess. (1959).

93. S. 3483, 86th Cong., 1st Sess. (1959). For a lengthy discussion of this bill and its consideration by the Judiciary Committee see Sobel, *supra* note 8 at 43-47.

football, basketball and hockey and baseball. It would have forced each major league team to limit its reserve list to forty veteran players. The impetus for the particular language of this bill was the actions of organizers of a rival major league, the Continental League. Ultimately the Subcommittee report⁹⁴ produced no recommendation on the legislation.

The bill was debated before the full Senate in June 1960.⁹⁵ A motion to recommit the bill to the Subcommittee passed,⁹⁶ and another Congressional session produced no legislation. The House considered a number of bills similar to the amended Celler bill considered by the 85th Congress. Hearings were held in September 1959 by the Antitrust Subcommittee of the House Committee on the Judiciary.⁹⁷

In 1961 Congress reacted swiftly in passing legislation⁹⁸ to allow all professional team sports to collectively negotiate for the national television package. The legislation was prompted by Judge Allan K. Grim's 1961 decision⁹⁹ holding that his earlier order¹⁰⁰ prevented the National Football League's package deal that it had negotiated with Columbia Broadcasting System.

The 87th Congress considered another bill¹⁰¹ from Senator Kefauver which was similar to S. 3483. Senator Hart introduced legislation¹⁰² to treat all team sports similarly. No hearings, however, were held. The bills were reported to the full Judiciary Committee by the Antitrust Subcommittee, but they were not reported out of the full Senate. Members of the House of Representatives introduced three bills¹⁰³ similar to Hart's bill.

Senator Hart proceeded to introduce similar legislation before the 88th Congress.¹⁰⁴ Hearings were held in January and February, 1964.¹⁰⁵ The Judiciary Committee favorably reported¹⁰⁶ the bill to the Senate in July, but the measure was not considered. The House of

94. S. Rep. No. 1620, 86th Cong., 2d Sess. (1960).

95. 106 CONG. REC. 14,728-33, 14,738-50 (1960).

96. *Id.* at 14,749-50.

97. *Hearings on H.R. 2370 before the Antitrust Subcommittee of the House Committee on the Judiciary*, 86th Cong., 1st Sess. (1959) (not printed).

98. 15 U.S.C. § 1291-1295 (1988).

99. *United States v. National Football League*, 196 F. Supp. 445 (E.D. Pa. 1961).

100. *United States v. National Football League*, 116 F. Supp. 319 (E.D. 1953).

101. S. 168, 97th Cong., 1st Sess. (1961).

102. S. 1856, 87th Cong., 1st Sess. (1961).

103. H.R. 178, H.R. 323, H.R. 1147, 97th Cong., 1st Sess. (1961).

104. S. 2391, 88th Cong., 2d Sess. (1964).

105. *Hearings on S. 2391 before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee*, 88th Cong., 2d Sess. (1964).

106. S. Rep. 1303, 88th Cong. (1964).

Representatives saw the active introduction of fourteen bills, but no action was taken.

On February 2, 1965, Senator Hart again introduced legislation¹⁰⁷ to place football, hockey, and basketball on equal antitrust terms with baseball. Hearings were conducted with special attention devoted to the acquisition of the New York Yankees by the Columbia Broadcasting System.¹⁰⁸ The Judiciary Committee sent the bill to the full Senate with its endorsement.¹⁰⁹ The bill was debated on the Senate floor on August 31, 1965,¹¹⁰ and a number of amendments were proposed. Senator Sam Ervin introduced an amendment to remove the exemption for the college player draft for athletes leaving school before the end of their eligibility, thus allowing freedom to bargain for every college athlete.¹¹¹ Ervin's amendment was defeated.¹¹²

Senator William Proxmire proposed an amendment to require all teams to divide evenly all television revenue.¹¹³ Proxmire was undoubtedly concerned about the eminent move of the Braves from Milwaukee to Atlanta. The Braves were being lured in part by the promise of increased television revenue. However, the amendment was easily defeated.¹¹⁴

Having beating back numerous attempts to amend the Hart initiative, the Senate passed the bill.¹¹⁵ The House of Representatives, however, did not consider the legislation. Another flurry of Congressional activity had failed to produce an act to alter baseball's relationship with federal antitrust laws.

During 1966 Congress turned away from a discussion of baseball's antitrust status to a consideration of a proposed merger between the American Football League and the National Football League. After passing a bill approving the merger as part of the investment tax credit bill, Congress retreated from the discussion of baseball's peculiar status as the Supreme Court prepared for the third time to consider baseball's reserve system against the backdrop of alleged violations of antitrust laws.

Three noteworthy events in 1966 would help shape the future of professional baseball. Sandy Koufax and Don Drysdale, pitching stars

107. The Professional Sports Act of 1965, S. 950, 89th Cong., 1st Sess. (1965).

108. *Hearings on S. 950 before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee*, 89th Cong., 1st Sess. (1965).

109. S. Rep. 462, 89th Cong. (1965).

110. 111 CONG. REC. 22,298-330 (1965).

111. *Id.* at 22,305.

112. *Id.* at 22,318.

113. *Id.*

114. *Id.* at 22,326.

115. *Id.* at 22,329.

for the Los Angeles Dodgers, had hired Hollywood agent J. William Hayes to negotiate a package deal for the upcoming year under threat of a dual holdout. Although Dodgers' owner Walter O'Malley was appalled at the thought of dealing with an agent, he was ultimately forced to relent and offer the two players significant salary increases.

After twelve years in Milwaukee and despite two National League pennants and strong fan support, the Braves moved to Atlanta in order to stake claim to the lucrative Southeastern television market. The state of Wisconsin sued the National League alleging a violation of state antitrust law. In *Wisconsin v. Milwaukee Braves, Inc.*,¹¹⁶ the Wisconsin Supreme Court ruled that state antitrust law was inapplicable and held that baseball's federal antitrust exemption required dismissal of the case.

In a move less noticed by the public but ultimately more important in the development of labor relations between ownership and players, the Major League Baseball Players Association hired their first executive director, former Steelworkers Union official Marvin Miller.¹¹⁷

THE FLOOD DECISION¹¹⁸

During the 1960's, centerfield for the St. Louis Cardinals was the domain of Curt Flood. Flood, a seven time Gold Glove Award winner with a lifetime average of .293 was co-captain during the 1965-1969 season. The Cardinals participated in the World Series in 1964, 1967, and 1968. In October 1969, the Cardinals traded Flood to the Philadelphia Phillies. Aggravated by the Cardinals insensitive treatment after twelve years of service, Flood approached Miller about suing Major League Baseball. Ultimately, the Executive Board of the Major League Baseball Players Association voted unanimously to underwrite Flood's case, and former Supreme Court Justice Arthur Goldberg was hired to represent Flood.¹¹⁹

Flood brought suit against Organized Baseball claiming that the enforcement of baseball's reserve system violated federal and state

116. 31 Wis. 2d 699, 144 N.W.2d 1, cert. denied, 385 U.S. 990 (1966).

117. See Marvin Miller, A WHOLE DIFFERENT BALL GAME: THE SPORTS AND BUSINESS OF BASEBALL 3-10, 33-62 (1991).

118. For a discussion of the *Flood* case from the position of the main combatants, see CURT FLOOD, THE WAY IT IS (1971); MARVIN MILLER, A WHOLE DIFFERENT BALL GAME: THE SPORT AND BUSINESS OF BASEBALL 170-202 (1991); BOWIE KUHN, HARDBALL: THE EDUCATION OF A BASEBALL COMMISSIONER 74-90 (1987).

119. For a brief appraisal of Goldberg's involvement in the case and Justice Blackmun's opinion, see BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 189-192 (1979).

antitrust laws, state common law, federal anti-peonage statutes, the thirteenth amendment, and federal labor laws.¹²⁰

The District Court for the Southern District of New York held first that Flood was not entitled to a preliminary injunction establishing him as a free agent.¹²¹ Such a result would not have maintained the status quo, but would rather have granted him his ultimate relief. Furthermore, there was no showing of sufficient probability of ultimate success on the merits to warrant injunctive relief.

Defendants subsequently moved for dismissal for lack of subject matter jurisdiction, failure to join indispensable parties, and for summary judgment on the fifth cause of action which involved the ownership of the St. Louis Cardinals by Anheuser-Busch, Inc. and the New York Yankees by the Columbia Broadcasting System.¹²² Summary judgment was granted for the Cardinals and the Yankees,¹²³ but the motions to dismiss on the first four causes of action were deferred until trial.¹²⁴

At trial,¹²⁵ Judge Irving Ben Cooper analyzed the necessity of the reserve system before turning to a discussion of *Federal Baseball*,¹²⁶ *Toolson*,¹²⁷ and the recent Second Circuit Court of Appeals decision in *Salerno v. American League*.¹²⁸ Cooper concluded that

Salerno mandates that plaintiff's federal antitrust claims be denied. Since baseball remains exempt from the antitrust laws unless and until the Supreme Court or Congress holds to the contrary, we have no basis for proceeding to the underlying question of whether baseball's reserve system would or would not be deemed reasonable if it were in fact subject to antitrust regulation.¹²⁹

Cooper also turned aside the state law claims¹³⁰ and the involuntary servitude claim.¹³¹

This decision was affirmed by the United States Court of Appeals for the Second Circuit.¹³² Judge Waterman asserted that [i]t appears

120. See note 2 *infra*.

121. 309 F. Supp. 793.

122. Flood v. Kuhn, 312 F. Supp. 404 (S.D.N.Y. 1970).

123. *Id.* at 409-410.

124. *Id.* at 411.

125. Flood v. Kuhn, 316 F. Supp. 271 (S.D.N.Y. 1970).

126. 259 U.S. 200 (1922).

127. 346 U.S. 356 (1953).

128. 429 F.2d 1003 (2d Cir. 1970).

129. 316 F. Supp. at 278.

130. *Id.* at 278-280.

131. *Id.* at 280-282.

132. Flood v. Kuhn, 443 F.2d 264 (2d. Cir. 1971).

to be without question that, today, professional baseball . . . is interstate commerce."¹³³ However, in ruling against Flood's position on state law claims, Waterman found

Hence, as the burden on interstate commerce outweighs the states' interests in regulating baseball's reserve system, the Commerce Clause precludes the application here of state antitrust law.¹³⁴

Judge Cooper decided that baseball was exempt from antitrust scrutiny under *Federal Baseball* and *Toolson*, that baseball's federal antitrust exemption pre-empted any state regulation and the reserve system did not constitute involuntary servitude.¹³⁵

The United States Supreme Court affirmed the opinion of the Second Circuit on June 19, 1972.¹³⁶ Justice Blackmun delivered the court's opinion.¹³⁷

Blackmun's decision began with a long historical discussion of the origins of baseball including a listing of numerous great players.¹³⁸ He analyzed the baseball records of Curt Flood including his salaries.¹³⁹ In affirming the decision of the lower courts, Blackmun discussed in sequence *Federal Baseball*,¹⁴⁰ *Toolson*,¹⁴¹ *United States v. Shubert*,¹⁴² *Radovich*,¹⁴³ and *International Boxing Club*.¹⁴⁴ He concluded his discussion of prior case history with the discussion of *Haywood v. National Basketball Association*¹⁴⁵ which held that basketball did not enjoy an exemption from the antitrust laws. In part five Blackmun concluded

1. Professional baseball is a business and it is engaged in interstate commerce.

2. With its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception

133. *Id.* at 267.

134. *Id.* at 268.

135. 316 F. Supp. 271.

136. *Flood v. Kuhn*, 407 U.S. 258 (1972).

137. Stewart and Rehnquist joined in all but part one which Burger and White joined. Burger filed a separate concurring opinion and Douglas and Marshall filed dissents. Brennan joined in the dissents.

138. 407 U.S. at 262-263.

139. *Id.* at 264-265.

140. 259 U.S. 200 (1922).

141. 346 U.S. 356 (1953).

142. 348 U.S. 222 (1955).

143. 352 U.S. 445 (1957).

144. 348 U.S. 236 (1955).

145. 401 U.S. 1204 (1971).

and an anomaly. *Federal Baseball* and *Toolson* have become an aberration confined to baseball.

3. Even though others might regard this as “unrealistic, inconsistent, or illogical,” see *Radovich*, 352 U.S., at 452, the aberration is an established one, and one that has been recognized not only in *Federal Baseball* and *Toolson*, but in *Shubert*, *International Boxing*, and *Radovich*, as well, a total of five consecutive cases in this Court. It is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of *stare decisis*, and one that has survived the Court’s expanding concept of interstate commerce. It rests on a recognition and an acceptance of baseball’s unique characteristics and needs.

4. Other professional sports operating interstate—football, boxing, basketball, and, presumably, hockey . . . and golf . . .—are not so exempt.

5. The advent of radio and television, with their consequent increased coverage and additional revenues, has not occasioned an overruling of *Federal Baseball* and *Toolson*.

6. The Court has emphasized that since 1922 baseball, with full and continuing congressional awareness, has been allowed to develop and to expand unhindered by federal legislative action. Remedial legislation has been introduced repeatedly in Congress but none has ever been enacted. The Court, accordingly, has concluded that Congress as yet has had no intention to subject baseball’s reserve system to the reach of the antitrust statutes. This, obviously, has been deemed to be something other than mere congressional silence and passivity. . . .

7. The Court has expressed concern about the confusion and the retroactivity problems that inevitably would result with a judicial overturning of *Federal Baseball*. It has voiced a preference that if any change is to be made, it come by legislative action that, by its nature, is only prospective in operation.¹⁴⁶

The Court upheld the Second Circuit’s ruling on the state antitrust law claim and did not reach the question of whether the reserve system was a mandatory subject of collective bargaining and exempted from the operation of antitrust laws.¹⁴⁷

Chief Justice Warren Burger’s concurring opinion noted his “grave reservations as to the correctness of *Toolson*.”¹⁴⁸ He urged Congress “to solve this problem.”¹⁴⁹

146. 407 U.S. at 282-283.

147. *Id.* at 285.

148. *Id.* at 285-286.

149. *Id.* at 286.

Justice Douglas in his dissent, which Justice Brennan joined, argued that *Federal Baseball* "is a derelict in the stream of the law that we, its creator, should remove."¹⁵⁰ Noting that the concept of commerce had changed significantly since 1922, Douglas closed by quoting *Radovich*

There can be no doubt "that were we considering the question of baseball for the first time upon a clean slate," we would hold it (baseball) to be subject to federal antitrust regulation. The unbroken silence of Congress should not prevent us from correcting our own mistake.¹⁵¹

Marshall's dissent, also joined by Brennan, focused on the involuntary servitude issue. Marshall argued that "(s)ince baseball is interstate commerce, if we re-examine baseball's antitrust exemption, the Court's decisions in . . . *Shubert* . . . , *International Boxing Club* . . . and *Radovich* . . . require that we bring baseball within the coverage of the antitrust laws."¹⁵² Douglass also noted that the lack of Congressional activity did not mandate the Court's refusal to overturn *Federal Baseball* and *Toolson*.¹⁵³ Marshall would have overruled both *Federal Baseball* and *Toolson*; however he stated that the labor exemption might not allow *Flood* to prevail.¹⁵⁴

POST-FLOOD CONGRESSIONAL ACTIVITY

Congressional action in response to the *Flood* decision was limited. In October 1975, the House Committee on the Judiciary held hearings¹⁵⁵ on two bills¹⁵⁶ which would "have voided the standard player contract as anticompetitive."¹⁵⁷ The hearings concentrated not on Major League Baseball, however, but on the activities of the National Football League.

Senator Alan Cranston introduced legislation¹⁵⁸ in the 96th Congress in June 1979. His bill would have repealed the antitrust

150. *Id.*

151. *Id.* at 288.

152. *Id.* at 291.

153. *Id.* at 292.

154. *Id.* at 293-296.

155. *Hearings on the Rights of Professional Athletes and H.R. 2355 and H.R. 694 before the Subcommittee on Monopolies and Commercial Law of the House Judiciary Committee*, 94th Cong., 1st Sess. (1975) [hereinafter *1975 Hearings*].

156. H.R. 694, H.R. 2355, 94th Cong., 1st Sess. (1975).

157. *1975 Hearings*, *supra* note 153 at 2.

158. S. 1303, 96th Cong., 1st Sess. (1979).

exemption and prohibited specific territorial restrictions. Similar legislation was introduced in the House of Representatives by Congressman Seiberling.¹⁵⁹ Additional legislation was also introduced in the House concerning broadcasting.¹⁶⁰ In 1980, Senator Magnuson introduced legislation in the Senate concerning franchise relocation.¹⁶¹

The mid-season baseball strike of 1981 coupled with the 1982 football strike prompted the introduction of legislation in the 97th Congress. In April 1981, the Sports Antitrust Reform Act of 1981¹⁶² was introduced in the House of Representatives by John Seiberling. The bill would have repealed baseball's antitrust exemption while restricting the exercise of exclusive territorial restrictions in professional sports. The House held hearings in 1982¹⁶³ to consider Seiberling's bill as well the Sports Franchise Relocation Act¹⁶⁴ and the Professional Sports Stabilization Act of 1982, introduced by Congressmen Henry Hyde, Fortney Stark, and Don Edwards.¹⁶⁵ None of these bills were acted upon. Discussions were held on the House floor on September 30, 1982.¹⁶⁶

In August and September 1982, the Senate Judiciary Committee held hearings on two bills¹⁶⁷ introduced by Senators Dennis DeConcini and Arlen Specter prompted by the move of the Oakland Raiders to Los Angeles. DeConcini's bill, the "Major League Sports Community Protection Act of 1982," was specifically targeted towards allowing leagues to determine when a member franchise could relocate. The legislation contained a further provision that the act would create no changes in existing antitrust treatment of "any player employment matter."¹⁶⁸ Specter's bill, the "Professional Football Stabilization Act of 1982," was even more specifically focused on professional football. Section four of S. 2821 listed three requirements¹⁶⁹ prior to allowing

159. H.R. 2129, 96th Cong., 1st Sess. (1979).

160. H.R. 1239, 96th Cong., 1st Sess. (1979).

161. S. 3183, 96th Cong., 2d Sess. (1980).

162. H.R. 3287, 97th Cong., 1st Sess. (1981).

163. *Hearings on Antitrust Policy and Professional Sports before the Subcommittee on Monopolies and Commercial Law of the House Judiciary Committee*, 97th Cong., 1st & 2d Sess. (1982).

164. H.R. 823, 97th Cong., 1st Sess. (1981).

165. H.R. 6467, 97th Cong., 1st Sess. (1981).

166. 128 CONG. REC. 11,170 (1982).

167. S. 2784, 97th Cong., 2d Sess. (1982), S. 2821, 97th Cong., 2d Sess. (1982).

168. S. 2874, sec. 3 (1982).

169. The requirements were (1) a failure by one or more parties "to comply with a provision of material significance to the (stadium lease) agreement," and no attempt to remedy the non-compliance within a reasonable time period, (2) an inadequate stadium with no intent to remedy the inadequacies, and (3) three years of annual net loss prior to relocation or losses during a shorter time period which endangered the "continued financial viability of the team." S. 282, sec. 4 (1982).

a professional football team with six years in a community from relocating.

In the 98th Congress, the Senate held hearings in 1984¹⁷⁰ on the Professional Sports Team Community Protection Act.¹⁷¹ The House Subcommittee on Commerce, Transportation, and Tourism held hearings¹⁷² on similar legislation.¹⁷³ Similar legislation was introduced in the 99th Congress.¹⁷⁴ During the 100th Congress, two bills¹⁷⁵ were introduced concerning the air broadcasting of baseball games.

By the end of the 1980's, Major League Baseball's antitrust exemption had withstood another decade of Congressional assault despite the intense interest over the franchise relocations of the Raiders, Colts and Clippers: In order to determine the continued viability of baseball's unusual antitrust status in the 1990's, the scene has once again changed to the judiciary. The failure to successfully move the San Francisco Giants to Florida has refocused the federal courts on the parameters of baseball antitrust exemption.

PIAZZA V. MAJOR LEAGUE BASEBALL

In the fallout surrounding the failure to purchase the San Francisco Giants and move them to St. Petersburg¹⁷⁶ Vincent M. Piazza, Vincent N. Tirendi and PT Baseball, Inc. sued Major League Baseball claiming violations of the first and fifth amendments,¹⁷⁷ a section 1983¹⁷⁸ action,

170. *Hearings on the Professional Sports Team Community Protection Act before the Senate Judiciary Committee*, 98th Cong., 2d Sess. (1984).

171. S. 2505, 98th Cong., 2d Sess. (1984).

172. *Hearings on Professional Sports Team Community Protection Act before the Subcommittee on Commerce, Transportation, and Tourism of the House Energy and Commerce Committee*, 98th Cong., 2d Sess. (1984).

173. H.R. 5388, 5430, 98th Cong., 2d Sess. (1984).

174. Sports Community Protection and Stability Act of 1985, S. 298, 99th Cong., 1st Sess. (1985).

175. H.R. 2687, 100th Cong., 1st Sess. (1987); H.R. 2593, 100th Cong., 2d Sess. (1989).

176. See note 4 *infra*.

177. U.S. CONST. amend. I & V. Piazza and Tirendi alleged that Major League Baseball violated their first and fifth amendment rights by "(1) depriving them of their liberty and property interests and privileges without due process of law, (2) denying them equal protection of the laws, and (3) impairing their freedom of contract and association. *Piazza v. Major League Baseball*, 831 F. Supp. 420, 423 (E.D. Pa. 1993).

178. 42 U.S.C. § 1983 (1988). Piazza and Tirendi claimed Major League Baseball acted under color of state law because "(a) Baseball is exempt from liability under state antitrust laws; (b) there is a close nexus and symbiotic relationship between Baseball and state and local governments; and (c) Baseball acted in concert with the City of San Francisco to prevent the Giants from being relocated." 831 F. Supp. at 423.

and a violation of sections 1 and 2 of the Sherman Act.¹⁷⁹ Major League Baseball moved to dismiss claiming that the district court lacked subject matter jurisdiction over federal and state claims and that Piazza and Tirendi's federal claims failed to state a cause of action.¹⁸⁰ Major League Baseball also claimed that they were exempt from antitrust liability under *Federal Baseball*¹⁸¹ and its progeny.¹⁸²

In August 1992, Piazza and Tirendi agreed to form a limited partnership with four Florida residents to purchase the San Francisco Giants and move them to St. Petersburg, Florida. The Investors executed a Letter of Intent with Giants owner Robert Lurie to purchase the team for \$115 million. Defendant Ed Kuhlman, Chairman of the Major League Baseball Ownership Committee, authorized a background check of Piazza, Tirendi and the other investors in response to the submission of an application to Major League Baseball to purchase the Giants. Kuhlman and Ownership Committee member Jerry Reinsdorf subsequently stated that the background check had raised question about plaintiffs. Plaintiffs claimed that the implications associated them with the Mafia or organized crime. They were not apprised of the charges against them, given an opportunity to be heard, nor had they dropped out of the partnership. Major League Baseball ultimately accepted an alternative offer for \$15 million less in order to keep the franchise in San Francisco.¹⁸³

Judge John R. Padova first analyzed the standard of review before turning to a discussion of the direct constitutional claims which he dismissed for failure to state a cause of action. Padova next turned to the section 1983 action, and, in particular, the association of Major League Baseball to the city of San Francisco. Feeling that plaintiffs had shown sufficient facts to conclude that Major League Baseball had acted "under color of state law," Padova denied Major League Baseball's motion to dismiss the section 1983 claim.¹⁸⁴

Padova next considered Major League Baseball's motion to dismiss the antitrust claims because "(1) plaintiffs have failed to allege that Baseball's actions restrained competition in a relevant market; (2) plaintiffs have no standing to assert a Sherman Act claim; and (3) Baseball is exempt from liability under the Sherman Act."¹⁸⁵

179. 15 U.S.C. §§ 1-2 (1988). Piazza and Tirendi claimed that "Baseball has monopolized the market for Major League Baseball teams and that Baseball has placed direct and indirect restraints on the purchase, sale, transfer, relocation of, and competition for such terms." 831 F. Supp. at 423-424.

180. 831 F. Supp. at 421.

181. 259 U.S. 200 (1922).

182. 831 F. Supp. at 420.

183. *Id.* at 422-423.

184. *Id.* at 424-425.

185. *Id.* at 429.

In discussing the relevant market contention, Padova considered Major League Baseball's claim that plaintiffs were seeking to join Major League Baseball rather than compete with it. Padova offered an analysis of *Mid-South Grizzlies v. National Football League*,¹⁸⁶ which he distinguished on two grounds.

First, unlike the Grizzlies, the plaintiffs here were not seeking to join Major League Baseball through *creation* of a franchise but were attempting to purchase an *existing* team. The import of this distinction turns upon the second distinction, which is that also unlike the Grizzlies, who identified the relevant product market as major-league professional football generally, plaintiffs here have identified the relevant product market as the market for existing American League and National League baseball *teams*.¹⁸⁷

After analyzing the standing issue under the test established in *Associated Gen. Contractor, Inc., v. California State Council of Carpenters*,¹⁸⁸ Padova rejected Major League Baseball's contention that plaintiffs lacked standing.¹⁸⁹

Padova next turned to an analysis of Major League Baseball's claim to be exempt from federal antitrust liability by considering the decision of the District of Columbia Court of Appeals¹⁹⁰ and the Supreme Court in *Federal Baseball*,¹⁹¹ and the Supreme Court's opinions in *Toolson*¹⁹² and *Flood*.¹⁹³

Padova noted that each of the three cases involved the reserve clause. Major League Baseball argued that the exemption extended to the "business of baseball" generally, while plaintiffs asserted that the exemption was limited to the reserve clause. Padova asserted that "[i]n 1972, however, the Court in *Flood v. Kuhn* stripped from *Federal Baseball* and *Toolson* any precedential value those cases may have had beyond the particular facts there involved, i.e., the reserve clause." After an analysis of *Charles O. Finley & Co. v. Kuhn*¹⁹⁴ and recent cases considering stare decisis, Padova "conclude(d) that the antitrust exemption created by *Federal Baseball* is limited to baseball's reserve system, and because the parties agree that the reserve system is not

186. 420 F.2d 772 (3d Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984).

187. 831 F. Supp. 430.

188. 459 U.S. 519 (1983).

189. 831 F. Supp. at 433.

190. 269 F. 681 (C.C.D.C. 1920).

191. 259 U.S. 200 (1922).

192. 346 U.S. 356 (1953).

193. 407 U.S. 258 (1972).

194. 569 F.2d 527 (7th Cir. 1978), *cert. denied*, 439 U.S. 876 (1978).

at issue in this case, I reject Baseball's argument that it is exempt from antitrust liability in this case."¹⁹⁵

Padova then discussed the application of "rule stare decisis."¹⁹⁶ Padova concluded that "the *Federal Baseball* exemption is one related to a particular market—the market comprised of the exhibition of baseball games—not a particular type of restraint (such as the reserve clause) or a particular entity (such as Major League Baseball)."¹⁹⁷

Judge Padova's intriguing analysis of the cases providing baseball with its antitrust exemption and narrowing its scope to the reserve clause could effect the need for Congressional activity. However, scholars, Congressmen and judges argued for the premature death of the exemption after *Gardella*¹⁹⁸ and prior to *Flood*.¹⁹⁹ Therefore, until the United States Supreme Court supports Padova's position, it would be best to consider the Court's admonition in both *Toolson*²⁰⁰ and *Flood* to turn to Congress for resolution of baseball's antitrust status.

CURRENT LEGISLATIVE INITIATIVES

The 103d Congress is considering three bills²⁰¹ targeting baseball's antitrust exemption. Senator Howard Metzenbaum introduced S. 500, the "Professional Baseball Antitrust Reform Act of 1993," on March 4, 1993. Metzenbaum's bill would add a new section to the Clayton Act²⁰² making organized baseball subject to the antitrust laws with the exception of the provisions of the Sports Broadcasting Act of 1961.²⁰³ Representative Bilirakis introduced H.R. 108 and H.R. 1549, the "Baseball Antitrust Restoration Amendment of 1993," in the House of Representatives. H.R. 108 would subject baseball to antitrust scrutiny, while H.R. 1549 will exclude baseball from the antitrust exemption with respect to certain television contracts.

In December 1992, as the second session of the 102d Congress was nearing its end, Senator Metzenbaum, chairman of the Subcommittee on Antitrust, Monopolies and Business Rights of the Senate Judiciary Committee, convened oversight hearings on baseball's

195. 831 F. Supp. at 438.

196. *Id.* at 438-439.

197. *Id.* at 439.

198. 172 F.2d 919 (2d Cir. 1949).

199. 407 U.S. 258 (1972).

200. 346 U.S. 356 (1953).

201. H.R. 108, H.R. 1549, S. 500, 103d Cong., 1st Sess. (1993).

202. 15 U.S.C. §§ 12-27 (1988).

203. 15 U.S.C. §§ 1291-1295 (1988).

antitrust status.²⁰⁴ In March 1993, Representative Jack Brooks, chairman of the Subcommittee on Economic and Commercial Law of the House Judiciary Committee, held hearings on the same topic.²⁰⁵ The major concerns of both chairmen and their subcommittees are the changing nature of the commissioner's position and the resignation or ouster of Fay Vincent and franchise relocation or expansion. The comments of witnesses before the two subcommittees is a starting point for analyzing the viability of the exemption and whether Congress, after more than forty years of consideration, should finally alter more than seventy years of jurisprudence with legislation to strip baseball of its exemption.

CURRENT COMMENTARY ON THE ANTITRUST EXEMPTION

Andrew Zimbalist, Robert A. Woods Professor of Economics at Smith College, presented his thoughts on the economics of baseball and the antitrust exemption at the 1992 hearings. His remarks were subsequently edited and expanded and published in an article in the *Seton Hall Journal of Sport Law*.²⁰⁶ Zimbalist's presentation to Metzenbaum's subcommittee²⁰⁷ concentrated on five justifications advanced by the ownership to support the exemption: players would challenge the Reserve Clause, Major League Baseball is not profitable, the exemption allows the commissioner to operate effectively, the exemption prevents franchise relocations, the exemption prevents frivolous litigation. In his article,²⁰⁸ Zimbalist addressed a sixth justification, that minor league baseball would be destroyed without the exemption.

Gary Roberts, Vice Dean and Professor of Law at Tulane University, also presented his thoughts on what he prefers to characterize as baseball's antitrust exclusion before Senator Metzenbaum's Subcommittee²⁰⁹ and Mr. Brooks Subcommittee.²¹⁰ His edited transcript of his 1992 comments was also presented as an article

204. *Hearings on Baseball's Antitrust Immunity before the Subcommittee on Antitrust, Monopolies and Business Rights of the Senate Judiciary Committee*, 102d Cong., 2d Sess. (1992) [hereinafter 1992 Hearings].

205. 1993 Hearings, *supra* note 3.

206. Andrew Zimbalist, *Baseball Economics and Antitrust Immunity*, 4 SETON HALL J. SPORT L. 287 (1994).

207. 1992 Hearings, *supra* note 204 at 281-332.

208. Zimbalist, *supra* note 206 at 303-306.

209. 1992 Hearings, *supra* note 204 at 333-357.

210. 1993 Hearings, *supra* note 3, at 75-96.

in the *Seton Hall Journal of Sport Law*.²¹¹ Roberts points to four areas in both his testimony and his article in which the exclusion offers protection from antitrust litigation: rules affecting players, rules affecting broadcasting, rules affecting the number, location and ownership of franchises, and the relationship between the major and minor leagues.²¹²

Allan Selig, Chairman of the Executive Council of Major League Baseball and President and Chief Executive Officer of the Milwaukee Brewers, presented comments before both subcommittees²¹³ and an edited text for the *Seton Hall Journal of Sport Law*.²¹⁴ Selig's comments presented his views on Major League Baseball's preference for franchise stability and the resignation of Vincent and the future governance of Major League Baseball.

NUMBER OF FRANCHISES

Of particular concern to the Congressional delegation from Florida is expansion or relocation of franchises.²¹⁵ Florida legislators argue that without the exemption either the Seattle Mariners or the San Francisco Giants would have recently been purchased and moved to the Tampa Bay area. However, a hallmark of all professional sports leagues is the restriction of the number of franchises and sharp control over relocation. Whether the complete elimination of baseball's antitrust exemption would promote expansion is questionable in light of the history of all major team sports. The lack of an antitrust exemption has not been as significant a factor in expansion activities in football, basketball, or hockey as market factors.

Professor Zimbalist, in comments before Senator Metzenbaum's subcommittee, stated

The overriding economic characteristic of the industry is that there is an artificial scarcity of franchises which is underwritten in part by baseball's blanket exemption from the country's antitrust laws. This scarcity of franchises and protected monopoly status, in turn, can be held responsible for many of the industry's problems.²¹⁶

211. Gary Roberts, *On the Scope and Effect of Baseball's Antitrust Exclusion*, 4 SETON HALL J. SPORT L. 321 (1994).

212. *Id.* at 325-329; 1992 Hearings, *supra* note 204, at 339-344.

213. 1992 Hearings, *supra* note 204, at 82-120 and 1993 Hearings, *supra* note 3, at 48-59.

214. Allan Selig, *Major League Baseball and Its Antitrust Exemption*, 4 SETON HALL J. SPORT L. 277 (1994).

215. See note 3 *supra*.

216. 1992 Hearings, *supra* note 204, at 281.

In considering the resulting uproar over the failure of the Giants to move to St. Petersburg, Roberts points out that the real crux of the problem is the lack of a sufficient number of franchises.²¹⁷ As Roberts notes, the lack of competition feeds the shortage by offering no alternatives to cities capable of supporting major league franchises:

The shortage of franchises to meet reasonable demand reflects the monopoly power of existing major league sports over the nationwide market in which franchises in each sport are sold. If a league faced meaningful market competition, it could not afford to let attractive communities go without a team lest the competitor take and entrench itself in those communities first.²¹⁸

Roberts further claims that the lack of significant revenue sharing supports Major League Baseball's economic-based decision to severely restrict expansion.

Professor Roger Noll of Stanford University, a long-standing expert on issues of economics and sports, also testified at the 1992 Metzenbaum hearings.²¹⁹ A proponent of removal of the antitrust exemption,²²⁰ Noll stated that "removal of the antitrust exemption in baseball is not likely, by itself, to solve the problem of scarcity in franchises."²²¹ Noll points out four factors that limit expansion: the franchise price effect, the home-town holdup effect, the broadcast revenue-sharing effect, and the local competition effect.²²² After discussing the inability of antitrust litigation to provide structural relief unless the federal government was the plaintiff or due to the reluctance to use antitrust to force expansion because of fear of retribution, Noll concluded by observing

Thus, eliminating the baseball antitrust exemption leaves baseball positioned like the other sports with respect to its control of franchises. Whereas it will lose some control over the location of its existing members, history in other sports suggests that it will still not expand to the extent warranted by the economics of the sport.²²³

Zimbalist, pointing to Noll's second expansion-limiting factor, attacked Selig's position on franchise stability by pointing out that Selig

217. Roberts, *supra* note 211 at 332-333.

218. *Id.* at 333.

219. 1992 Hearings, *supra* note 204 at 358-382.

220. *Id.* at 360.

221. *Id.* at 365.

222. *Id.* at 365-366.

223. *Id.* at 366.

recently threatened to move the Brewers to Charlotte or Phoenix if financial concessions were not made towards a new stadium in Milwaukee.²²⁴

Zimbalist suggests that "[t]here are enough economically-viable cities to support a gradual expansion to forty teams by the year 2004."²²⁵ Zimbalist argues for legislation offering host cities a right of first refusal, a system allowing for municipal ownership, legislation mandating expansion, a federal sports commission, or a division of existing teams into separate business entities.²²⁶

Congressional removal of the antitrust exemption will not force expansion nor necessarily solve the problems concerning the Florida Congressional delegation. Only Congressional action specifically forcing an expansion timetable, a difficult political position in which to gain support, will accomplish this goal. Protection for cities with existing franchises would best be resolved by considering legislation similar to that introduced in the aftermath of the Raiders move from Oakland to Los Angeles.

PLAYER RESTRAINTS

In great measure, the problems with the restrictive nature of the reserve system which were the focus of *Federal Baseball*,²²⁷ *Toolson*,²²⁸ and *Flood*²²⁹ have been significantly altered in Major League Baseball by the Messersmith-McNally arbitration decision²³⁰ and *Kansas City Royals v. Major League Baseball Players Assn*²³¹ which created a form of free agency which subsequently became embodied in collective bargaining agreements. The federal policy favoring labor law over antitrust law embodied in the statutory and non-statutory labor exemption in areas where the two policies come into direct conflict has relegated the antitrust lever relatively useless in forcing changes in systems restricting player mobility. Roberts supports this view by stressing that the adroit use of negotiating strength by the Major League Baseball Players Association has rendered the antitrust exclusion "virtually non-existent."²³² Although allowing expiration of the

224. Zimbalist, *supra* note 206 at 303.

225. Zimbalist, *supra* note 206 at 316.

226. *Id.* at 316-317.

227. 259 U.S. 200 (1922).

228. 346 U.S. 356 (1953).

229. 407 U.S. 258 (1972).

230. 66 Lab. Arb. 101 (1976).

231. 532 F.2d 615 (8th Cir. 1976).

232. Roberts, *supra* note 211 at 325-326.

collective bargaining agreement and union decertification can bring the leverage of antitrust liability into play as it did in *McNeil v. National Football League*,²³³ the protracted nature of this exercise does not render it particularly appealing.

Zimbalist, however, points to over four thousand minor league ballplayers as well as major league players without six years of experience as potential beneficiaries of the removal of baseball's exemption.²³⁴ However, the rights won by NFL players in *McNeil*, as in *Smith v. Pro-Football, Inc.*²³⁵ and *Mackey v. National Football League*²³⁶ earlier, were essentially compromised through approval of collective bargaining agreements. The introduction of a salary cap in the National Football League, similar to that in the National Basketball Association and proposed for Major League Baseball as part of the recently approved revenue sharing package, introduces a new type of salary control and player mobility restriction. Furthermore, as Leon Wood discovered when he attempted an antitrust assault on the National Basketball Association's salary cap and rookie draft, the Second Circuit Court of Appeals ruled that the labor exemption effectively destroyed that avenue of relief.²³⁷ The *Wood* case somewhat undercuts the argument that player restraints will necessarily be positively effected because the labor exemption may well insulate certain components of Major League Baseball's system from any antitrust attack on its restraint of minor league players or players with limited major league experience.

POWER OF THE COMMISSIONER

Senator Metzenbaum is particularly concerned about the departure of Fay Vincent as Commissioner of Baseball.²³⁸ His concern, as well as that of many others, is predicated upon the ability of the Commissioner to employ the "best interests" of baseball clause to protect the integrity of the games and perhaps, the concerns of fans. This power is not predicated upon the antitrust exemption, nor has it been a bellwether in producing pro-competitive results. The power to hire and fire the commissioner has always been the prerogative of team owners, and it is arguable that the commissioner has often

233. 790 F. Supp. 871 (D. Minn. 1992).

234. Zimbalist, *supra* note at 290.

235. 420 F. Supp. 738 (D.D.C. 1976).

236. 543 F.2d 606 (8th Cir. 1976).

237. *Wood v. National Basketball Association*, 809 F.2d 954 (2d Cir. 1984).

238. See note 2 *supra*.

operated in the interest of any group other than the majority of owners. Furthermore, one individual's determination of what actions are in the best interest of the game do not necessarily insure those results. The current restructuring may, indeed, strip the commissioner of his historic powers. However, the simple removal of the antitrust exemption, without any other measures to insure a mechanism which produces pro-competitive results, will not produce the results Senator Metzenbaum desires.

MINOR LEAGUE BASEBALL

Neil J. Sullivan in his book *The Minors*²³⁹ argues that the basic structure of minor league baseball was forced upon them by Major League Baseball which destroyed the independent minor league system during the first-half century by ultimately forcing their farm system and its underlying economic structure upon the minor leagues. The recent resurgence of economically viable minor league teams brought about tough negotiations when the Professional Baseball Agreement between the minor leagues and Major League Baseball was restructured in 1990.²⁴⁰

It is true that baseball's minor league system is substantially different than the collegiate system which produces players for the National Basketball Association or the National Football League. The implications of antitrust law is different for baseball. However, to argue that the loss of the exemption would destroy the minor leagues gives too little credit to a new economic order in minor league cities. Although the loss of the exemption might create a significant restructuring in the financial relationship with Major League Baseball, two factors point towards a continuation of the minor league system: the lack of major league expansion and the need for a system to generate major league talent. With the current financial constraints on universities engaged in major sports within the structure of the National Collegiate Athletic Association, it is unlikely that collegiate baseball will be elevated to the level of basketball and football.

BROADCASTING RIGHTS

Certain aspects of baseball's broadcasting activities is protected from antitrust attack by the Sports Broadcasting Act.²⁴¹ As Zimbalist

239. Neil J. Sullivan, *THE MINORS* (1990).

240. See ANDREW ZIMBALIST, *BASEBALL AND BILLIONS: A PROBING LOOK INSIDE THE BIG BUSINESS OF OUR NATIONAL PASTIME* 105-121 (1992).

241. 15 U.S.C. §§ 1291-5 (1988).

and Roberts point out, the Major League Baseball's cable package on the Entertainment and Sports Programming Network (ESPN) probably violates the Sports Broadcasting Act.²⁴² A loss of baseball's exempt status would subject the package deal to an antitrust challenge, but Zimbalist argues that the net result would be to simply redistribute the revenue from local to national sources.²⁴³ This concern has been furthered effected by the revenue sharing agreements reached by ownership, subject to the negotiation of a new collective bargaining agreement with the Major League Baseball Players Association.

CONCLUSION

Congressional discussion of baseball's antitrust exemption stretches over forty years involving a significant number of legislative initiatives. Although the exemption is a judicial aberration without justification, the 103d Congress will probably be no more successful than its predecessors in altering its long-standing existence. The three bills under consideration are not specifically crafted to resolve the problems of the changes in the commissioner's office or the lack of an expansion franchise or the relocation of an existing franchise to the Tampa-St. Petersburg area. Much of the history of Congressional concern over baseball's antitrust status suggests that broad-based attempts to completely remove the exemption will not produce a favorable vote. Only legislation tailored to a specific problem, such as the Sports Broadcasting Act, would offer a solution in these two areas.

The concern over the alteration of the commissioner's position will probably not receive long-term Congressional interest. The "best interests" of baseball clause will not create additional expansion opportunities, bring about labor-management peace, forestall a work stoppage, or generate pro-competitive results for fans. Furthermore, the retirement of Senator Howard Metzenbaum will curtail some of the current momentum for antitrust reform.

Lifting of the exemption alone will not force substantial expansion of Major League Baseball. Territorial allocations of geographic markets and limitations on the number of total franchises still provide baseball owners with limited competition for the Major League Baseball fans' live gate attendance. Undoubtedly the existence of the exemption has aided Major League Baseball in preventing the creation of competing baseball leagues. The only recent serious challenge to Major League

242. Zimbalist, *supra* note 206 at 311; Roberts, *supra* note 211 at 327.

243. *Id.*

Baseball, the Continental League, was blocked by the 1960's expansion of the American League and the National League into three of the eight intended Continental League cities.²⁴⁴ The National Football League, the National Basketball Association, and the National Hockey League, without the assistance of an antitrust exemption, have been challenged by competing leagues in court as well on the gridiron, court, and ice. All three leagues have been forced to merge with their most effective competitor leagues, or they have beaten back the challenging leagues during the past thirty years to leave only one major league with a monopolistic hold on the current landscape of major team sports. Furthermore, the recent discussion of additional expansion into Phoenix and St. Petersburg may persuade Senator Graham and Representative Bilirakis to accept a possible offer of a guaranteed franchise in exchange for dropping the pursuit of the removal of the exemption through Congressional action.²⁴⁵

Major League Baseball has enjoyed a tremendous ability to survive, and, indeed, thrive, despite all attempts by ownership and players to destroy it. Unless the current legislation is amended to offer a focused solution to an identified problem, the 103d Congress will probably offer no greater threat to baseball's storied seventy years of privileged antitrust status than the past twenty-two Congresses.

244. ALEXANDER, *supra* note 6 at 246-247; JAMES QUIRK & RODNEY D. FORT, *PAY DIRT: THE BUSINESS OF PROFESSIONAL TEAM SPORTS* 320 (1992); ZIMBALIST, *supra* note 240 at 16-17.

245. Hubert Mizell, *Bypassed Bay Hopes Once Again*, ST. PETERSBURG TIMES, Mar. 3, 1994, at 1C; Hal Bodley, *Baseball Forms New Expansion Committee*, USA TODAY, Mar. 3, 1994, at 1C.

